No. 82-1959

In the Supreme Court of the United States

October Term, 1982

ARNOLD INDUSTRIES, INC., and
GEORGE BLACKSTONE,
Petitioners,

vs.

ARTHUR STICKLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 22, petitioners Arnold Industries, Inc. and George Blackstone respectfully file this Reply to Brief of Respondent in Opposition to Petition for Writ of Certiorari.

PROCEEDINGS BELOW

Respondent notes in footnote 1 of his Brief that the motion he filed in the Tenth Circuit to dismiss petitioners' pending appeal was denied on February 4, 1983. Yet respondent continues to prosecute a cross-appeal in that court on the ground that the district court was without jurisdiction to enter a new judgment on November 23, 1982

and continues to insist that the Tenth Circuit cannot address the merits of petitioners' appeal. Should the Tenth Circuit eventually agree with respondent, the decision which the petition for writ of certiorari seeks to challenge will be given full force and effect and petitioners will be precluded from presenting their case on the merits to the Tenth Circuit. Hence, the issues presented by the petition are not moot.

SPLIT AMONG THE CIRCUITS

Respondent suggests that the decision below was based solely upon *A.O. Smith Corp. v. Sims Consolidated Ltd.*, 647 F.2d 118 (10th Cir. 1981), and asserts that "Petitioners do not contest the clarity of law of the Tenth Circuit" on the issue presented by the petition for writ of certiorari. Respondent has overlooked the fact that the decision below went substantially beyond *A.O. Smith* by refusing to give effect to the district judge's *nunc pro tunc* intention. In *A.O. Smith* the district court entered its Rule 54(b) certification without ordering it to have *nunc pro tunc* effect. Significantly, nowhere in his Brief does respondent even mention the *nunc pro tunc* issue.

Respondent attempts to distinguish the Seventh Circuit's decision in *Local P-171 Amalgamated Meat Cutters v. Thompson Farms Co.*, 642 F.2d 1065 (7th Cir. 1981), on the ground that the discussion there of the Rule 54(b) certification was "dicta." Respondent contends that the Seventh Circuit based its decision on the statutory provision for interlocutory appeal, 28 USC §1292(b).

Respondent is incorrect. In *Local P-171* the district court purported to certify a judgment under 28 USC §1292(b), but the court of appeals held that his order was in fact a Rule 54(b) certification:

> [W]e hold that in this case the district court's certification of these orders under 28 U.S.C. §1292(b) is to be treated as equivalent to certification under Federal Rule 54(b); that the orders so certified are appropriate subjects of Rule 54(b) certification; and that the district court's amendment nunc pro tunc adding the certification language was effective even though entered after the filing of the notice of appeal.

642 F.2d at 1069. The remainder of the court's opinion treats the entire issue as one dealing with Rule 54(b) certifications; the court clearly explained that 28 USC §1292(b) was inapplicable and irrelevant to the basis of its decision. In any event, whatever doubt existed as to the import of the *Local P-171* decision was resolved in *Sutter v. Groen*, 687 F.2d 197, 199 (7th Cir. 1982). Section 1292(b) was not involved in that case; only a Rule 54(b) certification had been made. Citing the *Local P-171* decision, the Seventh Circuit in *Sutter v. Groen* accepted jurisdiction based upon a notice of appeal filed before a Rule 54(b) certification was made and held: "[T]he Rule 54(b) certification is valid even though made after the filing of the notice of appeal in this Court." *Id.* Respondent makes no attempt whatsoever to distinguish *Sutter v. Groen.*

Respondent suggests that the holding in *Tilden Financial Corp. v. Palo Tire Service, Inc.*, 596 F.2d 604 (3d Cir. 1979), "is not really different from the holding of the Tenth Circuit in this case . . . ." Brief of Respondent at 5. This contention is rather remarkable considering

the fact that for an identical sequence of events (i.e., the filing of a notice of appeal after the entry of a non-final judgment but before the rendition of a Rule 54(b) certification), the Third Circuit gave effect to the premature notice of appeal and accepted jurisdiction over the merits of the appeal. Another "difference" between the decision below and *Tilden Financial Corp.* is that here the district court entered its Rule 54(b) certification *nunc pro tunc*. As already noted, respondent nowhere discusses the *nunc pro tunc* aspect of the district court's certification.

SEPARATE DOCUMENT REQUIREMENT

Respondent suggests that the district court's Rule 54(b) certification of June 17, 1982 is sufficient to satisfy the "separate document" requirement of Fed.R.Civ.P. 58. Clearly the Rule 54(b) certification is "separate" from any other documents signed by the district judge, but it is totally insufficient to constitute a judgment *effective on June 17, 1982*. The Rule 54(b) certification was only to be effective "nunc pro tunc March 2, 1982" and was to be read only *in pari materia* with the judgment of March 2, 1982. Standing alone, the June 17 certification was by its own terms not intended to be a "separate document" for purposes of Rule 58.

FEDERAL RULE OF APPELLATE PROCEDURE 4(a)

Respondent quotes from p. 4-116 of 9 J. MOORE, MOORE'S FEDERAL PRACTICE §204.14 (2d ed. 1983), suggesting that appellate Rule 4(a)(2) relating to premature notices of appeal does not save "an appeal that is taken from an order appealable only on a finding under Rule 54(b)." Clearly

the authors of that treatise were considering only the situation in which a Rule 54(b) certification never exists at all. In the complete absence of any such certification, appellate Rule 4(a)(2) provides no right to an immediate appeal of a judgment which disposes of less than all the claims or all the parties, because such a judgment would not be "final" for proposes of appeal under 28 USC §1291. MOORE'S FEDERAL PRACTICE addresses the precise issue presented by this petition only in footnote 35 of ¶203.11, and leaves the issue unresolved. *See* Petition for Writ of Certiorari at 8.

EXCEPTIONAL CIRCUMSTANCES

Respondent suggests that petitioners should be faulted for not following, or being aware of, the Tenth Circuit's previous decision in *A.O. Smith*. *A.O. Smith*, however, did *not* involve any *nunc pro tunc* intention and direction from the district court. Because the *nunc pro tunc* statement of the district court judge sufficiently distinguished the *A.O. Smith* case, because all relevant Supreme Court decisions regarding *nunc pro tunc* judgments indicated that the district judge's *nunc pro tunc* intention was legitimate and effective, and because petitioners relied on the district court's intent with respect to the effectiveness of the Rule 54(b) certification, the "exceptional circumstances" doctrine should have been applied in this case.

CONCLUSION

Respondent argues that even if there is a split among the circuits on the issues raised in the petition, such a conflict is not important enough to command the attention of this Court. Yet the Supreme Court is the only tribunal that can resolve the conflict. The primary issue presented

by the Petition for Writ of Certiorari is solely a procedural one; one need look no further than the text of the applicable rules to resolve the issue. Petitioners ask simply that the Court make uniform the proper application of the Federal Rules of Civil and Appellate Procedure.

There is no need to wait for any further development of the law in this area among the circuits. The Third and Seventh Circuits are applying a procedural rule in a manner directly contrary to the Tenth and possibly the Eleventh Circuits.[1] The time is ripe for resolution of this conflict.

Respectfully submitted,

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1. *See McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981), *cert. denied*, 102 S. Ct. 2249 (1982).